

GIFT MATENGA
versus
ANJIN INVESTMENTS PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 12 March 2014, 24 March 2014

Court Application-Malicious Prosecution

Mr. E Mangezi, for the applicant
Respondent in default

CHIGUMBA J: This matter came before me on the unopposed roll on 12 March 2012. It had started off as a chamber application for default judgment which was referred to the unopposed roll for filing of an affidavit of evidence and heads of argument to justify the computation of damages. I directed that the applicant file heads of argument in support of his claim for damages for malicious prosecution, more particularly, that applicant address the court on whether or not the requirements of a claim for malicious prosecution had been met, in the papers filed of record.

The applicant issued summons against the defendant, on 11 December 2012, claiming payment of US\$100 000-00 being general damages for malicious prosecution leading to loss of employment, and costs of suit. In the declaration, applicant averred that he was employed by the respondent as a security guard, and that, on 10 September 2010 he was summarily dismissed from employment on allegations of theft, and not paid his terminal benefits such as overtime, holiday and weekend allowances. On 27 September 2010, the applicant was served with a letter of summary dismissal after he tried to claim his dues, and was subsequently arrested on the same date, at the respondent's specific instance and request.

After spending a night in police custody, applicant appeared in court on 28 October 2010 on a charge of theft and was remanded out of custody. Thereafter, he attended court for routine remand twice a month until 31 May 2011, when the charges against him were withdrawn before plea. He was on remand for seven months, and during that period, was unable to secure

employment. He was unable to complete the probation period at the Civil Aviation of Zimbabwe where he had secured employment, because of the rigorous routine remand requirements. Applicant averred that the respondent's actions in causing his arrest were unlawful, wrongful, unwarranted, full of malice, and resulted in him suffering damages. Respondent entered appearance to defend against the claim in the applicant's summons, on 17 December 2012, and subsequently filed a plea on 15 January 2013. Ad paragraph 4 of the plea reads as follows:

“This is denied. The plaintiff received the money he is claiming after an out of court settlement negotiated by the plaintiff and his advisor (see annexure A and B)”. Annexure " A" is entitled “Statement of Undertaking by Parties to the Amicable Settlement Agreement between Mr. G. Matenga and Anjin Investments Private Limited. An agreed settlement sum of US\$4 404-00 was paid to the applicant. Clause 2 of the settlement agreement reads as follows:

“the undertaking by both parties is that payment of the agreed settlement amount shall put a close to all matters to do with the alleged unlawful dismissal and any other issues to do with his conditions of service at the time he was employed by Anjin Investments Private Limited.”

Annexure “B” is a letter dated 13 June 2011 addressed to the respondent's human resources manager by the applicant, in which applicant sets out a breakdown of the damages for his unlawful dismissal which he prepared with the guidance and assistance of the labour office, and which amounted to US\$4 404-00. At the pre-trial conference of this matter, on 5 February 2013, the following issues were referred for trial:

1. Whether the plaintiff is entitled to damages for malicious unlawful and wrongful address.
2. The quantum of damages due to the plaintiff.

On 28 November 2013, defendant failed to attend a pre-trial conference hearing before my brother JUDGE MAFUSIRE, and its defence was struck out and the matter referred to the unopposed roll for quantification of damages. In his heads of argument filed of record on 20 February 2014, the applicant avers that his claim is two legged, being a claim for damages for malicious prosecution and a claim for loss of employment occasioned by the malicious prosecution. The cause of action in an action for a claim of damages caused by malicious criminal or civil proceedings is the *action iniuriarum*. The plaintiff bears the onus in respect of all the elements of the delict, including that of *animus iniuriandi*. See Amler's *Precedents of pleadings* 7th ed, Harms, pp273-274, *Van der Merwe v Strydom* [1967] 3 All SA 281 (A),

Beckenstrator v Rottcher Theunissen [1955] 1 All SA 146 (A), *Rudolph v Minister of Safety & Security* [2007] 3 All SA 271 (T).

To succeed with a claim for malicious prosecution, a claimant must allege and prove that:

- (a) The defendant set the law in motion-instigated or instituted the proceedings;
- (b) The defendant acted without reasonable or probable cause;
- (c) The defendant acted with malice, or (*animo iniuriandi*); and
- (d) The prosecution has failed. See *Minister for Justice and Constitutional Development v Moleko* [2008] 3 AllSA 47 (SCA) , *Bande v Muchinguri* 1999 (1) ZLR 476 (H)

1. Setting the law in motion

The plaintiff must allege and prove that the defendant instituted the proceedings, that the defendant actually instigated or instituted them. The mere placing of information or facts before the police, as a result of which proceedings are instituted, is insufficient. See *Lederman v Moharal Investments (Pty) Ltd* [1969] 1 All SA 297 (A). The test is whether the defendant did more than tell the detective the facts and leave him to act on his own judgment. At pp197, the court stated that:

“Inherent in the concept 'set the law in motion', 'instigate or institute the proceedings', is the causing of a certain result, i.e. a prosecution, which involves the vexed question of causality. This is especially a problem where, as in most instances, the necessary formal steps to set the law in motion have been taken by the police and it is sought to hold someone else responsible for the prosecution. Amerasinghe, *Aspects of the Actio Injuriarum* in Roman-Dutch law, recognises that 'the problem is essentially one of causation' and suggests (at p. 20):

'The principle is that where a person acts in such a way that a reasonable person would conclude that he' (i.e. the defendant) 'is acting clearly with a specific view to a prosecution of the plaintiff and such prosecution is the direct consequence of that action, that person is responsible for the prosecution.'

On the other hand, an informer who makes a statement to the police which is willfully false in a material respect 'instigates' a prosecution and may be personally liable. See *Prinsloo v Newman* [1975] (1) SA 481 (A) 492.

From the papers filed of record, the summons and the declaration and the heads of argument, there is no evidence that respondent through its representatives made a false statement in a material respect, to the police, which would constitute instigation, for purposes of fulfilling the requirement of having 'instigated' the applicant's prosecution. It was the police who

preferred the charge of theft against the applicant. The court would need more evidence, that it was respondent who influenced the police to prefer that charge, based on what it told them. Such evidence was simply not adduced. The applicant's own perceptions of what respondent may or may not have told the police is not enough. It would have been prudent to secure the testimony of someone who was present when the report to the police was made, to establish whether respondent did more than report the facts and leave the police to exercise their discretion on whether to arrest the applicant and which charge to prefer against him. As things stand the applicant's averments on this aspect are speculative, and not based on any actual knowledge of whether the police were induced in any way by respondent to act against the him when there was no evidence of wrongdoing on his part.

2. Lack of reasonable or probable cause

The plaintiff must allege and prove that the defendant instituted the proceedings without reasonable or probable cause, a phrase which means 'an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept involves an objective and a subjective element. See *Beckenstrater v Theunisen* [1955] 1 All SA 146 (A). The applicant placed very scanty facts relating to the charge of theft, in the record of proceedings. We are not even told what items the applicant was alleged to have stolen, the value of the items, or how he is alleged to have misappropriated the items, or during which time period. The applicant could have attached the charge sheet and the state outline, or the form 242, to enable the court to assess the basis of the charge against him. As things stand, the court cannot assess whether or not the respondent lacked reasonable or probable cause to make the allegations that it did against the applicant. There is no evidence in the record to enable the court to do so.

3. Malice and *animus iniuriandi*

In the context of *animus iniuriandi* malice means *animus iniuriandi* and is not a separate element of the delict. See *Moaki v Reckitt & Coleman (Africa) Ltd* [1968] 3 All SA 242 (A). Due to lack of evidence in the record, the court is unable to establish whether or not respondent had reasonable or probable cause to make theft allegations against the applicant. How then can the court establish whether the respondent was motivated by malice?

4. Termination of Proceedings

This cause of action cannot be used to prejudge the reasonableness of the proceedings that form the subject of the complaint so the plaintiff must allege and prove that the proceedings were

terminated in his favor. See *Thompson v Minister of Police* [1971] 1 All SA 534 (E). In this case, it is common cause that the proceedings were terminated by the withdrawal of the charges before plea, which in effect means that the charges can be reinstated. There was no verdict in the applicant's favour, or an acquittal, or a finding of lack of guilt. We are not told of the reason why charges were withdrawn before plea. Was it due to lack of evidence? Or due to the need to investigate further? Certainly we are not told that the respondent withdrew its complaint against the applicant. The court cannot be left to speculate as to the reasons why proceedings were terminated. In my view the proceedings were not terminated with the degree of finality required in order to satisfy the requirement, for purposes of establishing a cause of action for malicious prosecution. There must be no prospect of the allegations being resuscitated, for the proceedings to be deemed "terminated".

5. Damages

Courts may award substantial damages for contumelia. See *Minister of Safety & Security v Semour* [2007] 1 All SA 558 (SCA), *Hsiao Chengu Liu v Hungu Yuen Wong & 2 Ors* HH314-13, *Retired Major General Happson Bonyongwe v Andrew Noel Granswick* HH434-13, *Ngonidzashe Sanangura v Econet Wireless & 2 Ors* HH 398-12, *Bande v Muchinguri* 1999 (1) ZLR 476 (H)

Disposition

The court accepts that, as a matter of law, malicious institution of legal proceedings, as a cause of action differs from unlawful arrest and detention. See *Munyai v Chikurira* 1992 (1) ZLR 145(H) @ 148-150, *Stambolie v Commissioner of Police* 1989 (3) ZLR 287 (SC) @ 301E-G, *The Law of delict* by McKerron 6th ed, @pp244. The requirements/elements are different. It is the court's view that there is no evidence, even *prima facie* evidence, that the respondent did anything more than merely place information or facts before the police, as a result of which proceedings were instituted. There is no evidence of any action on respondent's part, which may be deemed to constitute 'causation' of the applicant's prosecution. 'Causation' in the sense of something more than the ordinary relaying of facts in making a complaint in a criminal matter.

I find that, there is insufficient evidence to enable the court to assess the reasonableness or lack of it, of the respondent's allegations of theft against the applicant. There is no evidence before the court, that the report made by the respondent to the police contained false or inaccurate information calculated to cause the prosecution of the applicant when such

prosecution was not warranted. The applicant did not manage to establish a *prima facie* case against the respondent, based on malicious prosecution. All of the elements of the cause of action were not established. The evidence led was insufficient. The applicant did not discharge the onus on him to raise a presumption of probabilities in his favor, on a *prima facie* basis, which is a lower standard of proof than proof on a preponderance of probabilities. The applicant failed to establish the essential elements of the cause of action and is not entitled to judgment in terms of the summons. From the wording of annexure “A “and “B” to the summons, it is debatable whether the applicant gave up his right to institute any other proceedings whose cause of action emanated from his unlawful dismissal from respondent’s employ, when he entered into the settlement agreement with the respondent, on 4 July 2011.

Due to the insufficiency of the evidence before the court on the elements of the cause of action, that is the causation of the applicant’s prosecution, the reasonableness of the respondent’s report to the police, the termination of proceedings, it follows that applicant is not entitled to judgment in his favour, and there is no need to consider the question of the quantum of damages. The applicant’s claim is accordingly dismissed, and costs shall follow the cause.

J. Mambara & Partners, applicant’s legal practitioners